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## **THE PPACA IN WONDERLAND**

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# The PPACA in Wonderland

Gary Lawson<sup>†</sup> & David B. Kopel<sup>††</sup>

## I. INTRODUCTION

On August 22, 2009, when then-Speaker of the House Nancy Pelosi was asked by a reporter whether the Patient Protection and Affordable Care Act (PPACA)<sup>1</sup> was constitutional, she answered, “Are you serious? Are you serious?”<sup>2</sup> Two years later, many federal judges, more than half of the states, and a flood of distinguished constitutional scholars have examined the PPACA and found at least part of it to be unconstitutional. The question was, indeed, serious.

It remains serious today, as a Supreme Court decision on the constitutionality of the PPACA is expected in June 2012. Because the legality of the PPACA has emerged as perhaps the most publicly visible constitutional question since *Roe v. Wade*, clarity is vital not only for the PPACA itself, but also for general public understanding of the Constitution. Accordingly, our goals in this Article are to provide an opinionated, but hopefully fair-minded, guide to the constitutional issues of the PPACA and to clarify some misunderstandings that plague both popular and professional discussions of its surrounding issues. We believe that important portions of the Act are unconstitutional, and we will briefly make that case in this Article, but our primary task here is to promote clear and intelligible discussion rather than to persuade. Regardless of how the Supreme Court cases come out, the constitutional controversies highlighted in the current cases will remain the subjects of continuing debate.

Part II of this Article explores some of the different meanings of the word “unconstitutional” in legal, scholarly, and popular discourse. This lengthy digression is essential if one is to understand the course of discussion—whether legal, academic, or popular—about the “constitutionality” of the PPACA.

Part III of this Article looks very briefly at the complexities that come from discussing the “constitutionality” of a lengthy statute like the PPACA, with literally

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<sup>1</sup> Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

<sup>2</sup> See (and hear) Matt Cover & Michael W. Chapman, *Flashback: Pelosi on Obamacare's Constitutionality: 'Are You Serious?'*, CNS NEWS (Aug. 12, 2011), <http://cnsnews.com/news/article/flashback-pelosi-obamacares-constitutionality-are-you-serious>.

hundreds of separate provisions. In this short discussion, we merely raise rather than resolve the problems that arise in this context.

In Part IV, we make a case that the individual mandate in the PPACA is not constitutionally authorized by the federal taxing power, the federal commerce power, or the Necessary and Proper Clause. According to the original meaning of the Constitution, Congress acted without legal authority when it enacted the individual mandate. We express no view on whether the Supreme Court will find the act unconstitutional, for the Supreme Court often deviates from the original meaning of the Constitution. If we were capable of accurately predicting Supreme Court outcomes, we would both probably have other jobs that would make us fabulously wealthy.

## II. HUMPTY DUMPTY: “THE” MEANING OF “THE CONSTITUTION”

When somebody proclaims an action “unconstitutional,” what do they mean? There is no single answer to that question; different people mean different things, and sometimes the same people mean different things at different times.<sup>3</sup> It is difficult to have intelligent and productive conversations about constitutionality when the participants in those conversations are using the word “unconstitutional” in differing, ill-defined, and/or equivocal ways,—which is one big reason why so much constitutional discourse is unintelligent and unproductive.<sup>4</sup>

Without undertaking an exhaustive linguistic analysis of the word “unconstitutional,” we can identify at least five families of meanings that people might attach to that term:

- (1) inconsistent with the text of the Constitution;
- (2) inconsistent with social understandings about what the Constitution means;
- (3) inconsistent with statements that various people (especially, Supreme Court Justices) have made about or in the name of the Constitution;

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<sup>3</sup> “[N]o word has a meaning *inseparably* attached to it; a word means what the speaker intends by it, and what the hearer understands by it, and that is all.” Lewis Carroll, *The Stage and the Spirit of Reverence*, quoted in LEWIS CARROLL, *THE ANNOTATED ALICE: THE DEFINITIVE EDITION* 213 n.10 (Martin Gardner ed., 2000).

A problem arises when the speaker intends one meaning, but the hearer understands a different meaning. This problem can be ameliorated when the speaker explains what he means by a word—for example, when Humpty Dumpty told Alice that by “glory” he meant “a nice knock-down argument,” and by “impenetrability,” he meant “that we’ve have enough of the subject, and it would be just well if you’d mention what you mean to do next, as I suppose you don’t mean to stop here all the rest of your life.” LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* (1871), reprinted in *THE ANNOTATED ALICE: THE DEFINITIVE EDITION*, *supra* at 129, 213.

So we too attempt to explain what various people mean when they say “constitutional,” even though sometimes those meanings have no more to do with the Constitution than Mr. Dumpty’s use of “impenetrability” has to do with whether something can be literally or figuratively penetrated.

<sup>4</sup> See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 583 (2010) (“There are three ways to analyze whether a law is constitutional or not. Does it conflict with what the Constitution says? Does it conflict with what the Supreme Court has said? Are there five votes for a particular result? Unless we are clear about which sense of ‘unconstitutional’ we are using, we are likely to talk past each other.”).

“Alice felt dreadfully puzzled. The Hatter’s remark seemed to her to have no sort of meaning in it, and yet it was certainly English.” LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* (1865), reprinted in *THE ANNOTATED ALICE: THE DEFINITIVE EDITION*, *supra* note 3, at 3, 72.

- (4) inconsistent with predictions about what various people (especially, Supreme Court Justices) are likely in the future to say about or in the name of the Constitution); and
- (5) inconsistent with certain policy or other personal preferences of the speaker.

#### A. TEXT

These are *families* of meanings, for there are innumerable variations within each family. Definition (1), for example, says nothing about how the meaning of the Constitution's text is to be determined. Sometimes, the text provides a clear answer under almost any plausible way of determining meaning. For example, the President must be at least thirty-five years old.<sup>5</sup> Very often, though, understanding the text requires that one go beyond the text. For example, the Second Amendment protects the right to "arms."<sup>6</sup> Because the text of the Second Amendment extols the militia, we can be sure that the "arms" in the Second Amendment are weapons rather than forelimbs. That step is easy, but then there is the harder step of figuring out what kinds of weapons are protected: the arms included in the dictionary definition, which would be anything that is useful for offense or defense? Arms suitable for a militia use? Only weapons that can be carried by an individual (and therefore "borne" in the narrowest sense)?

So, even when we want to use definition (1) (text) we often need to consider at least some of the other definitions.

#### B. SOCIAL PRACTICES AND UNDERSTANDINGS

Most persons who think about constitutional issues agree that social understandings and practices (definition (2)) are very important, and sometimes indispensable, for interpreting the Constitution. Today, among Supreme Court Justices and most law professors, there is a consensus that the original meaning of the Constitution is very important. Some persons believe that if the original meaning provides a clear answer then the inquiry is at an end. Others persons believe that original meaning can be trumped by long-standing historical practices, by contemporary views of the majority of the public, or by the contemporary views of a subset of the public (e.g., elite law professors).

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<sup>5</sup> U.S. CONST. art. II, § 1, cl. 5. To be sure, it is possible to argue that the thirty-five-year age limit is really a loose metaphor for maturity and that a very mature eighteen-year-old has in fact "attained the Age of thirty five Years" under the Constitution. See Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989); Paul McGreal, *There Is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2437-38 (2001). The fact that law professors' arguments that "thirty-five" means "of any age, as long as a person is mature," strikes most people as strange, and would have struck almost everyone as strange in 1788, demonstrates that well-evolved languages usually function reasonably well as tools of communication, allowing us to speak of the objectively correct "meaning" of a text.

Only in academia would this point warrant a footnote—with multiple citations. EN: Did you mean to offest this sentence into a new paragraph? GSL: Yes. Does "academy" mean academia?

<sup>6</sup> U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

For all of the various aspects of social practices and meaning, there are many sub-theories about how precisely to determine these aspects.<sup>7</sup> Likewise, there are various theories about how to combine original meaning with “living constitutionalism.”<sup>8</sup>

Everyone agrees that American practices and understandings are important, though there is widespread disagreement about *which* practices and understandings are important and *how* important they are for determining constitutional meaning. But what about the practices of other countries? In modern American politics, some persons insist that American courts should never rely on foreign precedents or law. Among judges and law professors, it appears that there is literally no one who agrees. The American legal system grew out of the English legal system. Therefore, to understand the original meaning of the U.S. Constitution, a person must have some understanding of the British roots from which American rights and practices grew. For example, when the Supreme Court was considering the detention of enemy combatants at Guantanamo Bay, both the majority and the dissent argued at great length about what exactly the English rules for habeas corpus were at the time of the American Founding.<sup>9</sup> All the Supreme Court Justices agreed that the constitutional right of habeas corpus protects, at the very least, the right of habeas corpus as it was understood in English law when the U.S. Constitution was ratified.

There is great modern disagreement about whether foreign laws or practices, other than pre-1789 English ones, should be considered relevant to the meaning of the U.S. Constitution. If we are going to look at other countries, should we look to modern Western Europe (which would militate against the constitutionality of capital punishment) or should we look more globally (which would militate in the other direction)?

Regarding the PPACA, we can guess, based on previous Supreme Court opinions, that Justices Breyer and Ginsburg will consider the fact that healthcare systems in Western Europe are highly socialized to be very significant, and that Justices Thomas and Scalia will consider that fact to be absolutely irrelevant to the meaning of the U.S. Constitution.

#### C. WHAT SOME PEOPLE SAY

Sometimes, what a particular person says may simply be strong evidence of social practices or understandings. For example, newspaper essays written by James Madison during the ratification debates over the U.S. Constitution provide powerful evidence not only of what the authors of the Constitution meant, but even more importantly as to what the People who actually ratified the Constitution understood it to mean (since they were presumably persuaded, for example, by Madison’s careful explanation that the federal government created by the Constitution could be active and effective in certain specified subjects, such as national defense, and would

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<sup>7</sup> For originalism, see, for example, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (originalism is “not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label”). For contemporary meaning, see Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, -- FLA. L. REV. -- (2012) (forthcoming)(**NOT OUT YET – PROBABLY WILL HAVE DRAFT BY FEB.**) [EN: Please let us know if you have a manuscript, title, a forthcoming publication date and journal, or any other information].

<sup>8</sup> See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>9</sup> See *Boumediene v. Bush*, 553 U.S. 723, 739-46, 843-49 (2008).

have no power over a large mass of subjects which would remain the responsibility of the States, such as care for the poor).

Definition (3) (“what certain people say”) involves something different: the view that simply because certain people say that something is (or is not) constitutional, the statement makes it so. For example, Presidents George W. Bush and Barack Obama have both said that the President has the unilateral power to put into a military prison, without trial, an American citizen who was on American soil.<sup>10</sup> Some Americans believe that because the American President says that indefinite imprisonment is constitutional, the imprisonment therefore *is* constitutional.

Of course, judges are the epitome of people regarded as having the power to make something constitutional or unconstitutional just by saying it is, especially the U.S. Supreme Court Justices. Regardless of whether a Supreme Court opinion seriously analyzed the constitutional text or its original meaning, the fact that a Supreme Court opinion declares something to be (or not be) constitutional is, to many people, decisive.<sup>11</sup> The Supreme Court certainly considers its precedents to be extremely important, and, except for Justice Thomas, the Justices tend to be cautious about over-ruling precedents, even when they believe that the prior cases were wrongly decided.

#### D. PREDICTIONS ABOUT WHAT OTHER PEOPLE WILL SAY

In 1897, Justice Oliver Wendell Holmes, Jr., famously wrote that law is nothing more than a prediction about what judges will do.<sup>12</sup> Today, the widely-cited and very influential Judge Richard Posner (7th Circuit Court of Appeals) adheres to the same position.<sup>13</sup> Critics charge that this view is a form of nihilism; they argue that “law” must necessarily include certain principles of fairness. In Nazi Germany in 1938, you could certainly predict with great certainty that judges would uphold the confiscation of Jewish property by the government. The critics of Holmes and Posner would, however, argue that the Nazi confiscations were not real “law,” but were merely force and violence pretending to be law. Nonetheless, people do sometimes (perhaps without realizing it) equate predictions of outcomes and constitutional meaning, so definition (4) must be acknowledged in any accounting of

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<sup>10</sup> Even worse than the Red Queen’s justice of sentence first—verdict afterwards. See CARROLL, ALICE’S ADVENTURES IN WONDERLAND, *supra* note 4, at 124. Compare with the mouse’s tale: “Said the Mouse to the cur, ‘Such a trial, dear sir, with no jury or judge, would be wasting our breath.’ ‘I’ll be the judge, I’ll be the jury,’ said cunning old Fury: ‘I’ll try the whole cause, and condemn you to death.’” *Id.* at 34.

<sup>11</sup> For example, when asked about the Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), Nancy Pelosi said, “It is a decision of the Supreme Court. If Congress wants to change it, it will require legislation of a level of a constitutional amendment. So this is almost as if God has spoken.” The Prowler, *Nullification Nancy*, THE AM. SPECTATOR (July 5, 2005, 12:09 AM), <http://spectator.org/archives/2005/07/05/nullification-nancy>. Not everyone agrees that judicial pronouncements on the Constitution should carry that kind of privileged weight. See, e.g., Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

<sup>12</sup> “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897).

<sup>13</sup> See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003). A really careful legal realist would worry less about what judges will do than about what the people with guns who are supposed to enforce judicial orders will do. If the 101st Airborne Division, for example, was not particularly interested in what the Supreme Court has to say, it is not clear why legal realists should be interested either.

usages. Indeed, for lawyers advising clients, this definition may often be the most pertinent.

Often, predicting what judges will do is easy. If a police officer uses a properly functioning radar gun to track your car going 90 mph, and you have no special excuse (e.g., rushing your wife to the hospital because she is giving birth), then if you go to trial, the judge will almost certainly find you guilty of speeding.

On the other hand, appellate courts, and especially the Supreme Court, frequently decide cases where the law is unsettled. The PPACA cases are certainly such cases, and so prediction can be difficult.

When the PPACA was passed, there were plenty of people who insisted that the individual mandate was constitutional because judges would say that it is. Those predictions were very wrong; about half the judges who have considered the individual mandate have found it unconstitutional.<sup>14</sup>

#### E. PERSONAL PREFERENCES

Definition (5) (inconsistent with certain policy/opinions) may seem silly on its face as a definition of constitutionality, but it is in much wider use than many people admit publicly. In modern political or scholarly discourse, the word “constitutional” is sometimes just a way to use more letters to spell “what I want.” President Franklin Roosevelt was admirably candid. As he once wrote to a congressional committee chairman, “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.”<sup>15</sup>

Recall that Nancy Pelosi dismissed as not “serious” any questions about the potential unconstitutionality of the PPACA. As we will show momentarily, those questions are very serious indeed, if by “unconstitutional” one means any one of the definitions (1) through (4) (We are not insisting that use of any of the four definitions *proves* that the PPACA is unconstitutional—only that using definitions (1) through (4) would show that there is a serious question about possible unconstitutionality). On the other hand, if “unconstitutional” means “inconsistent with the political platform of the left wing of the Democrat Party,” then of course the constitutionality of the PPACA is not a serious question, and Representative Pelosi was entirely justified in dismissing the inquiry. Of course, one can also find usages of “unconstitutional” that amount to “inconsistent with the political platform of the conservative wing of the Republican Party” or, for that matter, “inconsistent with the political preferences of bipartisan moderates.” In an article on a different topic, those usages might find themselves highlighted.

For the rest of this Article, we will use the word “unconstitutional” in accordance with common versions of definitions (1) (text), (2) (original meaning), and (3) (Supreme Court precedents). We will focus mainly on (2).

What if the reader chooses to use the word “unconstitutional” in a different fashion? That is the reader’s prerogative—as long as that usage is employed clearly, consistently, and without equivocation. We believe (or at least hope) that our originalist analysis of the PPACA will prove useful even to persons who choose to

<sup>14</sup> See, e.g., *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff’d in part, rev’d in part*, *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (2011), *cert. granted*, 132 S. Ct. 604 (2011).

<sup>15</sup> Letter from Franklin D. Roosevelt, President of the U.S., to Samuel B. Hill, Chairman of the House Ways and Means Committee (July 6, 1935), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=14894#axzz1mWKxc01c>.



define “unconstitutional” in other ways. After all, a great many people who do not regard original meaning as *determinative* of constitutional meaning still find it *relevant* to constitutional meaning. And even if one regards original meaning as irrelevant to constitutional meaning, enough people use the word “unconstitutional” in some fashion resembling our usage to make our analysis of at least anthropological interest.

### III. ALL THE KING’S HORSES: IF THE INDIVIDUAL MANDATE IS UNCONSTITUTIONAL, IS THE ENTIRE PPACA BROKEN?

When Nancy Pelosi said, “Are you serious? Are you serious?” she was responding to a specific question about the PPACA’s individual mandate that will compel most Americans to either have government-approved health insurance or pay a monetary penalty.<sup>16</sup> If one believes that this provision is unconstitutional, does that mean that one necessarily believes that the entire PPACA is unconstitutional?

That question is also a serious one. Not within the living memory of any American has the Supreme Court scheduled three days of oral arguments for a particular collection of cases. In late March, the Supreme Court will devote one day of oral argument to the question whether finding part of the PPACA unconstitutional means that the entire PPACA is void.

The PPACA is a long, complicated statute, consuming 906 pages in its slip form. There are currently active legal challenges to many provisions in the statute, including but not limited to the issues that the Supreme Court is currently considering: the individual mandate to buy health insurance and the mandate that states drastically expand their Medicaid programs. Other provisions not currently before the courts could potentially be subject to challenge under a number of plausible understandings of “unconstitutional.” For example, the PPACA micromanages the terms of insurance contracts, requiring insurers to provide and consumers to purchase coverage that meets federal specifications. As a matter of original meaning, it is doubtful that Congress has any power to set the terms of insurance contracts.<sup>17</sup> In addition, on many subjects the PPACA does not actually establish rules for conduct but simply tells administrative agencies to make up the rules.<sup>18</sup> As a matter of original meaning, there are serious limits to Congress’s ability to delegate law-making power to executive department (or judicial department) agents.<sup>19</sup> These challenges, however, are not raised by litigants because those

<sup>16</sup> See Cover & Chapman, *supra* note 2.

<sup>17</sup> Several exhaustive studies of founding-era usages of the term “commerce” have demonstrated that the Constitution uses the word “commerce” to refer only to a particular subset of economic activity—primarily the buying and selling of goods by merchants. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006). Prior to the New Deal, the Supreme Court repeatedly affirmed that insurance contracts “are not articles of commerce in any proper meaning of the word.” *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869). The Supreme Court reversed itself in 1944 in *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944), which was a thinly and poorly reasoned decision that misused available sources (and ignored others). See Barnett, *supra* note 4, at 583-86.

<sup>18</sup> See CURTIS W. COPELAND, CONG. RESEARCH SERV., REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111-148) (2010), available at <http://www.shrm.org/hrdisciplines/benefits/Documents/Regulations.pdf> (identifying more than forty provisions of the PPACA that confer significant rulemaking authority on federal officials and hundreds of provisions that make reference to administrative authority).

<sup>19</sup> See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

provisions are unlikely to be “unconstitutional” under definition (4) (i.e., predictions about what Supreme Court Justices are likely to say in the future).

Our discussion in this Article focuses on the individual mandate. One federal judge who found the mandate unconstitutional believed that the entire statute—all 906 pages of it—therefore had to be found unenforceable as well, because Congress never would have enacted the rest of the statute if it could not enact the mandate.<sup>20</sup> He pointed out that when enacting a bill, Congress frequently includes a severability clause stating that if one provision in the bill is found unconstitutional, Congress intends that the other, not-unconstitutional provisions remain in effect. Congress did not include a severability clause in the PPACA. Under current law, which asks hypothetical questions about the likely intentions of Congress if certain provisions cannot be implemented, there are good arguments that the individual mandate cannot be severed from the PPACA’s comprehensive take-over of health insurance: if Congress cannot force young, healthy people to buy health insurance that is priced far above its actuarial value, then the whole scheme of forcing private insurance companies to use the excess profits from the young and the healthy in order to provide actuarially unsound, low-cost insurance to unhealthy people collapses.

On the other hand, there is a plausible argument that, in the absence of a clause directing the courts to sever or not sever provisions, courts should never invalidate more than the specific provisions found unconstitutional. After all, to say that a provision of a law is unconstitutional is merely to say that it cannot be treated as binding law when it is challenged in a particular case; it does not mean that all copies of the U. S. Code have to be reprinted to expunge it and everything enacted with it. The rest of the law, which is presumably constitutional standing on its own, remains law until properly repealed, and it is not obvious where courts get the authority to ignore validly-enacted laws based on speculation about unstated congressional wishes. We do not further address in this Article whether the individual mandate is severable from the rest of the statute. The question is obviously serious, but an analysis of severability would require a separate article.<sup>21</sup>

#### IV. “[T]HAT’S NOT A REGULAR RULE: YOU INVENTED IT JUST NOW.”<sup>22</sup> THE UNCONSTITUTIONALITY OF THE INDIVIDUAL MANDATE

Section 1501(a) of the PPACA mandates that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential [health insurance] coverage for such month” or else face a monetary “penalty.”<sup>23</sup> This is the provision whose constitutionality Nancy Pelosi could not

<sup>20</sup> See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1299-1305 (N.D. Fla. 2011), *aff’d in part, rev’d in part*, *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

<sup>21</sup> For an exhaustive survey of the severability issue, see Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?* 16 TEX. REV. L. & POL. 1 (2011).

<sup>22</sup> CARROLL, ALICE’S ADVENTURES IN WONDERLAND, *supra* note 4, at 120. Alice was objecting to the King’s rule that all persons more than a mile high (allegedly Alice, although she denied the fact) must leave the courtroom. *Id.* The King retorted that the mile-high rule was “the oldest rule in the book,” to which Alice replied that the King had previously announced that the purported mile-high rule was “Rule Forty-Two.” *Id.* If the rule were actually the oldest, said Alice, “[t]hen it ought to be Number One.” *Id.* And if America’s “oldest rule in the book,” the Constitution, had meant to give Congress the power to force people to engage in commerce, it would have said so.

<sup>23</sup> 26 U.S.C.A. § 5000A(a)-(b)(1) (West 2010). The criteria for “minimum essential coverage” are defined in 26 U.S.C.A. § 5000A(f) (West 2010), and the PPACA provides exceptions for prisoners

bring herself to treat as a serious question. It is also the provision whose constitutionality has sharply divided the federal courts, the legal academy, and the American public.

One might think this provision unconstitutional for several different reasons. First, one might believe that it violates some underlying individual right, such as the right to personal autonomy or to make choices about one's health. This kind of argument has received very little play even among critics of the PPACA, and we do not pursue it here.<sup>24</sup>

Second, one might believe that it exceeds the enumerated powers of Congress to enact. Arguments of this kind have flooded courtrooms, academies, and coffee shops. Any institution of the national government constitutionally can act only if it has an explicit or implicit authorization for that action in the Constitution. For Congress constitutionally to enact any law, the law must fall within some power granted to Congress by the Constitution. Defenders of the individual mandate have put forward three principal candidates for such a power grant, and we believe that all three fail to authorize it.<sup>25</sup>

#### A. THE TAX POWER

The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises."<sup>26</sup> Pursuant to the PPACA, the penalty for not buying a congressionally designed health insurance policy will be collected by the Internal Revenue Service. Does that make the mandate penalty a tax authorized by the Taxing Clause?

The Anti-Injunction Act<sup>27</sup> bars taxpayers from suing to challenge the legality of a tax before the tax is owed. While most federal judges hearing the PPACA cases have concluded that the Anti-Injunction Act does not prohibit them from considering the constitutionality of the PPACA, two judges on the Fourth Circuit Court of Appeals<sup>28</sup> and one judge on the D.C. Circuit Court of Appeals<sup>29</sup> ruled that no challenges to the individual mandate could take place until the mandate comes into effect in 2014. The Supreme Court will consider this issue. However, the Fourth

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and some members of narrowly-defined religious communities. 26 U.S.C.A. §§ 5000A(d)(2)-(4) (West 2010).

<sup>24</sup> For an exploration of some variants of such arguments, see Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209 (2011).

<sup>25</sup> A fourth possible argument might try to find authorization in a broad congressional power to promote the "general welfare." See SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2005). Current law does not recognize any such power. The constitutional text gives Congress the power to tax "for the general welfare." U.S. CONST. art. I, § 8, cl. 1. Current doctrine infers from this taxing power a power to spend for the general welfare (an inference that at least one of us thinks is mistaken, see GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 25-27 (2004)), but even that doctrine does not permit Congress to enact any law that Congress thinks will make some people better off. For a detailed analysis of the "general welfare" language, see Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003). A full analysis of the original meaning of the general welfare clause would require a separate article, or perhaps even a book (which Lawson is contemplating). For present purposes, it is enough to note that constitutional authorization for the individual mandate cannot come from the general welfare language in the Article I Taxing Clause.

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>27</sup> 26 U.S.C. § 7421(a) (2006).

<sup>28</sup> See *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at \*5-6 (4th Cir. Sept. 8, 2011).

<sup>29</sup> See *Seven-Sky v. Holder*, 661 F.3d 1, 21-23 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Circuit was careful to say that just because the Anti-Injunction Act bars a 2011 or 2012 challenge to the PPACA, that does not necessarily mean that the individual mandate penalty is a constitutionally legitimate use of the tax power. All the other courts that have reached the tax issue have agreed that the individual mandate cannot be justified by the Constitution's tax power. The latter conclusion is right for several independent reasons.

First, even if Congress *could* have enacted the mandate as a tax, it did not do so. The PPACA calls the penalty a "penalty"<sup>30</sup> and not a "tax." Other provisions in the PPACA (including some which have since been repealed or modified) specifically used the word "tax,"<sup>31</sup> indicating that Congress knew how to distinguish taxes from penalties. This was not an accidental use of language; anyone who paid attention to the debates over the PPACA knew that supporters of the law twisted themselves into pretzels to avoid presenting the mandate as a tax. President Barack Obama, whose signature was necessary for the PPACA to take effect, told CNN in September 2009 that the penalty is "absolutely not a tax."<sup>32</sup> It is true that the penalty is placed in the Internal Revenue Code, in a subtitle with the heading "Miscellaneous Excise Taxes." But the Code itself declares that the headings have no legal significance, and no inferences can be drawn from them.<sup>33</sup>

Nor can one cavalierly ignore the labels given by Congress and simply re-classify penalties as taxes (or vice versa); there are different constitutional consequences that attach to penalties and taxes. Penalties, for example, are subject to the Eighth Amendment's ban on "excessive fines,"<sup>34</sup> while "excessive taxes" are not. Penalties, for their part, are not subject to the apportionment and uniformity requirements for taxation that we discuss below. Labels matter. While Congress does not always need to use the word "tax" in order to impose a tax, where Congress uses the word "penalty" in a context in which it would have been linguistically easy but politically deadly to use the word "tax," the most plausible conclusion, as a matter of ordinary statutory interpretation, is that Congress meant a penalty rather than a tax. The PPACA is not an exercise of the taxing power.

Second, even if Congress had wanted to enact the mandate as a tax rather than a penalty, it would have had grave constitutional difficulty doing so. The Constitution does not authorize Congress simply to impose "taxes." Instead, it distinguishes among different varieties of taxes and prescribes different constitutional rules and limitations for each variety. The basic distinction is between *direct* taxes and *indirect* taxes. The former category includes *capitation* (or *head*) taxes, which are essentially taxes on people simply for being people, and also includes property taxes, which are essentially taxes on land.<sup>35</sup> *Indirect* taxes are taxes on the consumption, sale, or transfer of things, which the Constitution then subdivides into "Duties, Imposts and Excises."<sup>36</sup> Under the Constitution, "Capitation, or other direct,

<sup>30</sup> PPACA, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244 (to be codified at 26 U.S.C. § 5000A(b)(1)).

<sup>31</sup> See, e.g., *id.* §§ 9001, 9015, 9017, 10906, 10907.

<sup>32</sup> See ABC News, *Obama Goes Toe-to-Toe with Stephanopoulos on "Tax Increases"*, YOUTUBE (Sept. 20, 2009), [http://www.youtube.com/watch?v=rL7ak\\_MGyw](http://www.youtube.com/watch?v=rL7ak_MGyw).

<sup>33</sup> "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title . . . ." 26 U.S.C. § 7806(b) (2006).

<sup>34</sup> U.S. CONST. amend. VIII.

<sup>35</sup> The Constitution does not refer specifically to taxes on land, but it was commonly understood in the eighteenth century that land taxes were direct taxes.

<sup>36</sup> For an exposition of the differences among duties, impost, and excises, see Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour): An Examination of the Views of Hamilton*,

Tax[es]”<sup>37</sup> must be apportioned among the States according to their population;<sup>38</sup> so if New York has twenty times as many people as Rhode Island, the total amount of any direct tax collected from people in New York must be twenty times as much as the total tax collected from people in Rhode Island. That is obviously both administratively and politically very difficult—which was the whole idea.

Indirect taxes are subject to different rules. They need not be apportioned by population. So when Congress imposed an excise tax of \$200 on machine gun sales, it was irrelevant that the revenues from, say, Montana (where machine guns are popular) might be much greater than the revenues from Delaware, with about the same population as Montana but a much more torpid market in machine gun sales. The rule for indirect taxes is that they must be “uniform throughout the United States.”<sup>39</sup>

If you are wondering about the federal income tax’s classification, it is a combination of excise taxes (e.g., on income from jobs) and of direct taxes (e.g., on certain revenue from real estate). But the direct tax portions of the federal income tax are exempt from the usual requirement for apportionment by state population. The Sixteenth Amendment, ratified in 1913, declares: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”<sup>40</sup>

A fee for not having a governmentally approved health insurance policy is not a tax on incomes authorized by the Sixteenth Amendment. The Sixteenth Amendment power to impose “taxes on incomes” is, obviously, something that can only be used on “income.” As the Supreme Court has explained, Sixteenth Amendment income is an “undeniable accession[] to wealth.”<sup>41</sup> That is, you have received some wealth. If you choose not to purchase congressionally-designed health insurance, there is no “accession to wealth.” You have exactly as much money as you did before; there is no “income” to tax.

Nor is the individual mandate penalty an indirect tax. Duties, imposts, and excises are all taxes on the purchase, sale, or transfer of goods, such as an excise tax on the acquisition of a machine gun. Despite the efforts of some academics to elide this basic fact,<sup>42</sup> doing nothing is not an activity that can be subject to an excise tax. There is no event to be taxed, and never in American history has a federal excise tax been imposed on an American’s personal inactivity.<sup>43</sup> Congress can indirectly tax

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*Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 88-94 (1999).

<sup>37</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>38</sup> *Id.*

<sup>39</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>40</sup> U.S. CONST. amend. XVI.

<sup>41</sup> *Comm’r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

<sup>42</sup> See, e.g., Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE 27, 31 (2010), <http://yalelawjournal.org/2010/5/31/galle.html> (claiming that the mandate penalty “is imposed on a particular use of wealth: the use of personal wealth for purposes other than the purchase of health insurance. Alternatively, it could be seen as a tax on a particular form of insurance: the choice to shift the risk of future medical needs from oneself to the social safety net”). This is a clever misconstruction of the normal meaning of words—just as good as the March Hare’s insistence that Alice have “more tea” when she had not had any yet. CARROLL, ALICE’S ADVENTURES IN WONDERLAND, *supra* note 4, at 75. “Pay taxes on your health care, even though you haven’t had any yet.”

<sup>43</sup> The only instance in which inactivity per se has ever been taxed concerns trusts: when a trust which was created for express purpose of disbursing money in a certain way and at a certain rate fails to do so, the trust’s excess retained wealth can be taxed. Trusts are artificial entities created by law,

your purchase of potato chips, and it can indirectly tax your cable television subscription, but it cannot indirectly tax you for just sitting on your couch and doing nothing.

Thus, if the penalty is to be viewed as a tax, it would constitutionally have to be classified as a “direct tax”—similar to a head tax or a tax on real estate. The Constitution requires that such taxes be imposed “in Proportion to the Census.” The individual mandate penalty is not so apportioned.

Congress does, however, have nearly limitless authority to create income tax deductions, and under current law probably could have created one for the cost of buying approved insurance, just as it creates deductions for dependents or mortgage interest. According to the Supreme Court, while the Constitution imposes various restrictions on taxes, it imposes hardly any restrictions on tax deductions. Deductions are, in the Court’s words, “a matter of legislative grace.”<sup>44</sup> So Congress could have raised income taxes by *X* amount, and then given an income tax deduction of *X* amount to every individual who bought congressionally-sanctioned health insurance.

But that is not the mandate that Congress enacted. Enacting the mandate via a constitutional use of the tax power would have required Congress to say that the PPACA involved a tax increase. And even though most people (who bought health insurance according to Congress’s wishes) would have suffered no net tax increase, Congress was simply unwilling to mix the mandate with any form of tax increase. So, the mandate that Congress did enact is not constitutionally authorized by the taxing power.

#### B. THE POWER TO REGULATE INTERSTATE COMMERCE

Much of the ink (or the electronic equivalent thereof) that has been spilled by courts and academics about the individual mandate has focused on whether the mandate is authorized by the Commerce Clause, which gives Congress power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>45</sup> This clause has been the purported justification for a wide range of federal laws, including prohibitions on local loan-sharking<sup>46</sup> and growing marijuana in your kitchen.<sup>47</sup>

Oftentimes when people say that something is “too obvious for argument” (e.g., “Are you serious?”), it is a ruse to conceal the weakness of their position. But sometimes things really are too obvious for argument. And it is too obvious for

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and subject to the rules under which they are created. American citizens, however, are not created by the government and do not exist for the purpose of carrying out specified purposes determined by the government. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The current litigation concerning the Commerce Clause also involves a purported distinction between activity and inactivity, with some opponents of the PPACA arguing that Congress’s power to regulate commerce does not include the power to regulate inaction. *See* *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 547 (6th Cir. 2011). That is a completely different argument from the one that we are making here concerning taxation. Our point is that inactivity is not something that is a taxable event under the provision authorizing the imposition of “Duties, Imposts and Excises.” Whether inactivity can be “Commerce,” or whether regulating inactivity can be “Necessary and Proper” for executing the power to regulate commerce, are not relevant to the issue of whether inactivity can create a taxable event.

<sup>44</sup> *Interstate Transit Lines v. Comm’r*, 319 U.S. 590, 593 (1943).

<sup>45</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>46</sup> *See* *Perez v. United States*, 402 U.S. 146 (1971).

<sup>47</sup> *See* *Gonzalez v. Raich*, 545 U.S. 1 (2005).

argument that failing to acquire a specific kind of health insurance is not, by any permissible use of the English language, “Commerce . . . among the several States.”<sup>48</sup> No one seriously believes that forbidding you from sitting around in your skivvies while not having government-prescribed health insurance is a regulation of interstate commerce, just as no one seriously believes that forbidding you from growing marijuana in your kitchen window (or wheat on your farm for consumption entirely on your farm) is regulating interstate commerce. Rather, the Commerce Clause has become a stand-in—a metaphor of sorts—for a very different kind of constitutional argument that was better understood prior to the last half-century.

In the 1995 case of *United States v. Lopez*, which for the first time in almost sixty years enforced limits on Congress’s power to regulate the activities of citizens under the purported use of commerce power, the Supreme Court identified

three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.<sup>49</sup>

The first category squarely meets the ordinary-language definition of interstate commerce. If a wholesaler in Florida sells surgical equipment to a retailer in Georgia that is “Commerce . . . among the several States.”

The second category – the instrumentalities or channels of interstate commerce—also meets that ordinary language definition—if you look at the Founding Era use of “commerce” as a legal term of art. The Founders, when using the word “commerce” in a legal sense, used it to refer not only to mercantile exchange, but also to some closely-related activities, such as bills of credit and navigation.<sup>50</sup>

The individual mandate obviously does not involve actual interstate commerce. Indeed, health insurance is one of the few products that most states forbid their residents from buying out of state. And the individual mandate is not about steam boat navigation, trains, interstate highways, or other instrumentalities of interstate commerce.

Since the PPACA does not fit under the “channels” or “instrumentalities” categories, what about the third category: “activities having a substantial relation to interstate commerce?”<sup>51</sup> This is the only category that could plausibly include the individual mandate.

It is linguistically obvious that activities that substantially affect or are substantially related to interstate commerce are not themselves interstate commerce. Therefore, a clause that authorizes regulation of interstate commerce cannot possibly authorize regulation of things that substantially affect interstate commerce but are not themselves interstate commerce. As we will explain below, that does not mean that Congress cannot regulate activities that substantially affect interstate commerce. It just means that the Commerce Clause cannot be the provision that authorizes such

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<sup>48</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>49</sup> *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

<sup>50</sup> See Natelson, *supra* note 17, at 843.

<sup>51</sup> This is also sometimes described as activities that have a “substantial economic effect on interstate commerce.” *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

regulation. So why did the Supreme Court in *Lopez* place this category of activity under the rubric of regulations of interstate commerce?

The answer is that this usage is a habit of sloppy thinking that has developed over the past half-century. The cases during the New Deal that recognized an expanded federal power over intrastate activities (that is, activities that take place entirely within one state and thus never constitute interstate commerce) *did not* do so by expanding the category of “interstate commerce” to include activities that substantially affect, but are not themselves, such commerce. Rather, those cases utilized the separate clause of the Constitution that gives Congress power to make laws “necessary and proper for carrying into Execution”<sup>52</sup> other federal powers, such as the commerce power.<sup>53</sup> The reasoning in those cases was that activities that are not interstate commerce, and thus which cannot be regulated under the interstate commerce power, might nonetheless be regulated by Congress if that regulation was “necessary and proper” for executing a genuine use of the commerce power. For example, Congress has power under the Commerce Clause to regulate interstate rail traffic. The Commerce Clause does not authorize regulation of wholly intrastate rail traffic; but what if Congress determined that regulation of interstate traffic required, for its full effectiveness, regulation of intrastate traffic as well? For example, in order to prevent price discrimination between interstate and intrastate railroad traffic, one must control both the interstate and the intrastate rates to make sure that they are equivalent.<sup>54</sup> Could one say that, when intrastate activity has a substantial effect on interstate activity, regulation of such intrastate activity is “necessary and proper for carrying into Execution”<sup>55</sup> the undisputed power to regulate interstate activity?

One certainly could say that, and it is precisely what the New Deal Supreme Court (and occasionally the pre-New Deal Supreme Court) said. As a matter of original meaning, one might well be *wrong* in so saying in any particular case, either because to “carry into Execution” a law means simply to prescribe tools for its enforcement and punishment, *not* to make it as effective as possible, or because the requirement that laws be “necessary and proper” demands a tighter fit between means, ends, and constitutional structure than a mere observation that Congress deems something important for carrying out an enumerated power. But it is certainly a more plausible line of constitutional argument than claiming that something that is obviously not interstate commerce can nonetheless be regulated under a clause authorizing the regulation of interstate commerce. The New Deal cases did not commit that primitive linguistic and conceptual error.

Once one recognizes, under the Necessary and Proper Clause, a power to regulate activities that are not interstate commerce when those activities substantially affect interstate commerce (and it is therefore “necessary and proper for carrying into Execution” the underlying commerce power to regulate them), it is very easy simply to skip a step in the reasoning process and say that “the Commerce Clause” allows Congress to reach activities other than interstate commerce. Technically, it is the Commerce Clause in conjunction with the Necessary and Proper Clause that authorizes such regulation, but as long as the non-interstate-commerce activity is properly reachable through the Necessary and Proper Clause, it

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<sup>52</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>53</sup> See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807-08 (1996).

<sup>54</sup> See *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 353-54 (1914).

<sup>55</sup> U.S. CONST. art. I, § 8, cl. 18.



normally does not greatly affect outcomes if one shortens it simply to “the Commerce Clause.”

Today, after half a century of shorthand references to “the Commerce Clause” as the source of power to regulate activities other than interstate commerce, the role of the Necessary and Proper Clause in the constitutional analysis has largely (though not wholly) dropped out of the picture. The result is the passage in *Lopez* which, reflecting several decades of prior case law to the same effect, simply folds the regulation of activities that “substantially affect” interstate commerce into the regulation of interstate commerce itself. As is often true in the law, the shorthand reference took on a life of its own, and now an entire doctrine has developed around the legal equivalent of a “slip of the tongue.” There is a very good chance that this relatively short-lived doctrine is going to be the basis upon which the Supreme Court decides the constitutionality of the individual mandate. But as a matter of sound constitutional analysis, the real question must be whether the individual mandate—which regulates doing absolutely nothing—is justified as a law “necessary and proper for carrying into Execution” the presumed congressional power to regulate the interstate activity of insurance.<sup>56</sup>

It generally makes no real difference if the regulation of activity that is not itself commerce is analyzed under the Necessary and Proper Clause or directly under the Commerce Clause. Normally, the constitutional inquiry is the same: one is simply asking whether the activity affects interstate commerce substantially enough to permit its regulation. But on rare occasions skipping a step in the analysis and moving directly to the Commerce Clause question misses something crucial. The individual mandate is one of those rare cases. The individual mandate fails a threshold inquiry under the Necessary and Proper Clause that must be undertaken *before* one asks whether it is “necessary and proper for carrying into Execution” any federal power. If one conducts the analysis entirely under the Commerce Clause, without explicit reference to the Necessary and Proper Clause, one will miss that threshold inquiry, to which we now turn.<sup>57</sup>

### C. NECESSARY AND PROPER

Suppose that you want to authorize someone to act on your behalf—for example, as a sales agent in a foreign country. You will have to decide how much authority you are willing to grant to your agent. Should they be allowed to enter into binding sales contracts? To arrange for sales on credit rather than simply for cash? To commit you to engaging in joint ventures? To sell the entire business out from under you if, in the agent’s judgment, the offer is sufficiently attractive?

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<sup>56</sup> As we have noted, many of the New Deal cases justified enhanced federal power over the economy by employing the Necessary and Proper Clause, not by expanding or altering the core meaning of interstate commerce. A few cases, however, directly re-defined the scope of interstate commerce, and one of those cases was *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944), which held for the first time in the nation’s history that the writing of insurance contracts constitutes interstate commerce. As a matter of original meaning, the case is wildly wrong. See Barnett, *supra* note 4, at 585-86. But to pursue that topic would take us too far afield, so we assume for purposes of the present Article that Congress can use its commerce power to regulate the terms and conditions of insurance contracts.

<sup>57</sup> What would the answer be without that threshold inquiry (and counterfactually assuming that regulation of insurance is regulation of interstate commerce)? As a matter of original meaning, it would require a detailed analysis of the Necessary and Proper Clause, which is beyond the scope of this Article. As a matter of extrapolations from existing case law or predictions of likely Supreme Court voting patterns, we defer to Barnett, *supra* note 4, at 620.

You can write a document specifically authorizing the agent to do any or all of these things. But because the circumstances that the agent might encounter are limitless, there is no way to plan in advance for every contingency—and the costs of drafting a document precise and complete enough specifically to cover many contingencies will be large. Accordingly, a better option might be to come up with a few specific grants, a few specific actions that the agent is categorically forbidden from performing, and a more general “sense” of the agent’s authority in the vast majority of cases that you cannot precisely foresee. Since thousands of other principals (the people who authorize agents to act on their behalf) make similar engagements and documents, over time certain conventions are likely to arise about the presumptive authority of agents. In each particular context (sales agent, rental agent, executor of estate, etc.), the law eventually will develop a set of background rules that serve as the default authority for agents in the absence of express provisions in any particular instrument. The law will also develop a set of “pre-packaged” ways of conferring greater or broader authority upon agents beyond the express grants in the instrument.

By the time that the American Constitution was drafted in 1787, the law of agency indeed had developed some very powerful conventions. Agents were presumed, unless the instruments granting them authority said otherwise, to have implied power to perform those tasks that are *incidental* to the *principal* tasks that they were charged to perform. As William Blackstone wrote, “[a] subject’s grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant.”<sup>58</sup> Overseas sales agents, for example, with the *principal* authority to enter into binding sales contracts, generally had the *incidental* or implied power to make sales on credit; if a particular businessperson wanted to deny their sales agent that authority, it would be necessary to spell out that denial in the agent’s instructions. But the authority to sell the entire business, even if a really great offer were made, was not *incidental* to the *principal* powers of a sales agent and would not be implied. Certainly, a principal could grant an agent such authority if the principal so wished, but it would have to spell out that power as a principal power of the agent. The power to sell the business would be, as authors of the time phrased it, as “worthy”<sup>59</sup> as the power to arrange for sales of the product. It could be enumerated as a *principal* power of the agent, but in the absence of that enumeration it would not be implied as an *incidental* power.

By the late eighteenth century, there had developed a variety of stock phrases available to drafters of instruments to confirm or clarify the scope of an agent’s implied powers.<sup>60</sup> One of those phrases—which prescribed a relatively narrow scope for the exercise of implied powers—was to grant the agent all powers “necessary and proper” for carrying into effect the principal powers.<sup>61</sup>

Article I, section 8 of the Constitution contains seventeen clauses enumerating specific powers granted to the Congress. The last clause of that section gives Congress power to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this

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<sup>58</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*347.

<sup>59</sup> GILES JACOB, A NEW LAW-DICTIONARY (J. Morgan ed., 10th ed. 1782).

<sup>60</sup> For a detailed discussion of the options available to eighteenth-century drafters, see Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 72-78 (2010).

<sup>61</sup> See *id.* at 79-80.

Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>62</sup> This clause—drafted by four agency lawyers and a businessman with experience acting as an agent<sup>63</sup>—was a straightforward “incidental powers” clause modeled after similar clauses found in agency instruments of the time. It confirms that Congress has a (cabined) range of *incidental* powers that can be used to implement its enumerated *principal* powers. But like any incidental powers clause in any agency instrument, it *does not* grant to Congress any power that is properly labeled principal rather than incidental.

This understanding of the Necessary and Proper Clause infused the Supreme Court’s leading decision on the scope of the clause. In *McCulloch v. Maryland*,<sup>64</sup> the Court faced a challenge to the Bank of the United States, which Congress had created as a “necessary and proper” means for executing various federal powers enumerated in the Constitution. The power to create a corporation is not among the enumerated powers of Congress. While the decision is famous for Chief Justice John Marshall’s discussion of the meaning of the word “necessary” (and for his analysis of federal-state relations), it also contains an oft-ignored but theoretically crucial discussion that consumes seven pages of the opinion *before* one gets to the meaning of “necessary.” If the power to incorporate was, by its nature, a *principal* power, then such a power *could not be granted* by an “incidental powers” clause such as the Necessary and Proper Clause. Rather, such a power could exist in the national government only if enumerated as a principal power. The Supreme Court took this argument very seriously. The Court noted that the power to incorporate was “not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, *which cannot be implied as incidental to other powers.*”<sup>65</sup> Instead, incorporation “must be considered as a means . . . not of higher dignity, not more requiring a particular specification than other means.”<sup>66</sup> The obvious implication is that some powers are of the same “dignity” (or are as “worthy”) as principal powers and thus cannot be incidents within the Necessary and Proper Clause. This inquiry into whether a claimed power is even conceptually or theoretically an incident must occur *before* one decides whether the power is, in any specific context, “necessary and proper for carrying into Execution” a principal power. Incidental powers must be “necessary and proper” in order to be constitutionally authorized by the Necessary and Proper Clause. Powers that are not incidental can *never* be authorized by the Necessary and Proper Clause, no matter how “necessary and proper” for any purpose they might be.

If the power to compel private citizens to purchase governmentally approved products from governmentally favored private firms is a principal rather than incidental power, then such a power can never be granted by the Necessary and Proper Clause; it would have to be enumerated as a principal power, rather than flowing as an incident from other principal powers. For reasons that we have laid out at length elsewhere,<sup>67</sup> the power to compel commercial transactions is every bit as “worthy” and of the same “dignity” as the kinds of powers recognized by the Constitution as principal powers. The most obvious comparison is with the power of

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<sup>62</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>63</sup> See Natelson, *supra* note 57, at 85-86.

<sup>64</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>65</sup> *Id.* at 411 (emphasis added).

<sup>66</sup> *Id.* at 421.

<sup>67</sup> See Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011).

taxation, which is essentially a power to compel transactions between citizens and the government. The power to compel commercial transactions between citizens and other citizens is at least as great, if not even greater. The kind of power—unprecedented in more than two centuries—represented by the individual mandate simply is not the kind of power that can be granted by the Necessary and Proper Clause.

Even if the power to compel commercial transactions with governmentally favored suppliers were somehow an incident, it would still have to be “necessary and proper for carrying into Execution” other federal powers, such as the power to regulate interstate commerce. Again for reasons that we have laid out at length elsewhere,<sup>68</sup> the mandate would founder on the shoals of the requirement that laws executing federal power be “proper.”. The word “proper” in the Necessary and Proper Clause denotes a set of fiduciary norms that presumptively binds agents exercising incidental powers. By the time of the Constitution’s drafting, eighteenth-century administrative law had already applied those norms to government agents exercising discretionary authority, and there is every reason to see the Necessary and Proper Clause as extending those norms to Congress in its exercise of implied authority.<sup>69</sup> Those norms clearly forbade the federal creation of monopolies (except pursuant to the enumerated, principal power to grant patents and copyrights).<sup>70</sup> The individual mandate is worse than a monopoly: it not only creates an oligopoly of favored providers but also *compels* customers to patronize them. It is hard to imagine something less “proper” as an exercise of incidental authority.

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When the Supreme Court decides on the constitutionality of the individual mandate, is it going to employ the language of principals and incidents drawn from eighteenth-century agency law or the fiduciary norms of eighteenth-century administrative law? We do not know. Unlike Humpty Dumpty we cannot “explain all the poems [or cases] that ever were invented—and a good many that haven’t been invented just yet.”<sup>71</sup> But however the case is ultimately decided, it is a fine vehicle for exploring some basic concepts, and some basic ambiguities, central to American constitutionalism. We hope that we have made those concepts and ambiguities a bit clearer here.

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<sup>68</sup> *See id.*

<sup>69</sup> For an extended discussion, see Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE*, *supra* note 57, at 120, 137-41.

<sup>70</sup> *See* Lawson & Kopel, *supra* note 64, at 290.

<sup>71</sup> CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, *supra* note 3, at 214.